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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LUKE DAVIES,

Plaintiff and Respondent,

v.

L.A. CHECKER CAB  
COOPERATIVE, INC.,

Defendant and Appellant.

B277260

(Los Angeles County  
Super. Ct. No. SC111290)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge.  
Affirmed.

Law Offices of Cleidin Z. Atanous and Cleidin Z. Atanous  
for Defendant and Appellant.

Cheong, Denove, Rowell & Bennett, John D. Rowell and  
Shane V. Hapuarachy for Plaintiff and Respondent.

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Luke Davies (Davies) sued Los Angeles Checker Cab Cooperative, Inc. (Checker Cab) for injuries he suffered in an accident caused by one its cabs. The jury returned a special verdict in Davies's favor, finding that the driver of the cab was a Checker Cab's agent. On appeal, Checker Cab contends there was insufficient evidence of agency, and therefore its motion for judgment notwithstanding the verdict (JNOV) should have been granted. We disagree and affirm the judgment and order denying JNOV.

## **BACKGROUND**

### **I. The accident**

On June 9, 2010, Davies was riding his motorcycle on Sunset Boulevard near La Cienega in West Hollywood. A Checker Cab taxi abruptly pulled out from a hotel's taxi stand in front of Davies, causing him to crash and to suffer injuries. The taxi briefly stopped before leaving the scene. There was evidence that Ruben Popovian was driving the taxi, although he did not have a permit to drive a cab in West Hollywood.

### **II. Evidence of agency at trial**

Davies sued Checker Cab, Popovian, and Iosif Feinstein, who owned the cab involved in the accident.<sup>1</sup> The matter was tried by a jury.

At trial, Eugene Smolyar, Checker Cab's president, provided most of the pertinent testimony regarding agency. He testified that Checker Cab is a cooperative association in which shareholders (also known as owners) own the cabs—that is, each

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<sup>1</sup> A default judgment was entered against Popovian. Neither he nor Feinstein is a party to this appeal.

vehicle represents one share in the company. Shareholders can either drive their vehicle or lease it to a “lease driver,” who pays a lease fee to the owner, who in turn pays monthly dues to Checker Cab. Checker Cab’s board of directors, as well as the city’s department of transportation, must approve any sale of shares.

Feinstein owned the cab involved in the Davies accident, although Checker Cab was its “registered owner.” Sixty percent of the vehicles driving for Checker Cab were registered to Checker Cab, while the remaining 40 percent were registered to the owners. Although Smolyar testified that owners decide who will drive their cabs, Feinstein testified that Checker Cab assigns drivers and also advertises for drivers.

Checker Cab had 290 vehicles, all painted yellow and blue. Feinstein was told his car had to be a Crown Victoria. Drivers were required to wear a uniform.<sup>2</sup> All vehicles were equipped with a GPS system, and Checker Cab had to give monthly GPS reports to the city’s department of transportation.

According to Smolyar, Checker Cab had no employees. Instead, Checker Cab “organized” another company, Southern California Paratransit (SCP), to manage Checker Cab. Checker Cab and SCP, however, shared the same business address, Smolyar was also SCP’s president, and everything SCP did was for Checker Cab’s benefit. SCP, therefore, ran a call center to take customer calls, and operators answered the phone with, “This is L.A. Checker Cab.” SCP employed various people to manage Checker Cab. SCP employed dispatchers to monitor cabs and to resolve disputes between drivers and customers. A fleet

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<sup>2</sup> Smolyar testified at trial that Checker Cab did not require drivers to wear a uniform but was impeached with his deposition testimony to the contrary.

manager ensured the vehicles were drivable, had the appropriate decals and markings, and prepared the vehicles for annual inspection. A road supervisor went to accident sites and made sure cabs were properly servicing hotels. An operations manager oversaw dispatchers and call takers and resolved customer complaints. SCP employed two receptionists, one of whom acted also as a risk manager to evaluate accidents and another who managed Checker Cab's drug and alcohol testing program.

To provide services in a city, taxi companies must have a franchise agreement with that city. Checker Cab had franchise agreements with West Hollywood, where the accident took place, and with Los Angeles. Under its franchise agreement with West Hollywood, Checker Cab agreed to be directly and solely responsible for the conduct of its drivers, coordinators, and other personnel.<sup>3</sup> Under the agreement, the city can cite a cab driver for violating rules and regulations, but the company is assessed a portion of the fine.<sup>4</sup>

To drive a cab, the driver must get a permit from the city's department of transportation after passing a test. To help drivers get their permits, Checker Cab provides training classes, which Checker Cab's shareholders decided to provide. Permits must be renewed every two years. If someone wants to drive for Checker Cab, the company "run[s]" the driver's record.

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<sup>3</sup> The franchise agreement was admitted at trial but was not provided to the court as part of the record on appeal.

<sup>4</sup> Smolyar testified at trial that the driver is fined, but he was impeached with his deposition testimony in which he said, "And so the company gets a portion of the fine, and the driver gets a fine from the department of transportation."

According to the city's department of transportation rules, Checker Cab can suspend a driver for failing a drug test and for not reporting an accident. But, Checker Cab can suspend a driver for other reasons, like failing to make a lease payment to the owner. If a driver overcharges a customer, Checker Cab is supposed to notify the department of transportation. However, before Checker Cab does so, its disciplinary committee reviews the complaint and, in Smolyar's words, the driver can be suspended "maybe for a longer period of time because he had too many violations, too many overcharges. But, again, it's decided by the shareholders of the company and according to the rules and regulations" of the city's department of transportation.

Checker Cab drivers can drive for another company so long as they obtain a permit for that other company. Drivers can accept or reject customers and choose the hours they work and the routes they take. Drivers may get fares through the call center or they may personally make arrangements with customers. Similarly, Checker Cab can process credit card payments or drivers can utilize their own devices for credit payments.

### III. The verdict and JNOV motion

On June 8, 2016, the jury issued its special verdict finding that Checker Cab's drivers were its agents. The jury also more specifically found that Popovian was Checker Cab's, but not Feinstein's, agent. The jury further found that Checker Cab "approved" the conduct of Popovian or whoever was driving the taxi on the day of the accident. The taxi's driver was negligent, and the negligence was a substantial factor in causing Davies's injuries. Next, the jury found that Checker Cab was a common carrier which undertook an activity that can only be carried out

under a public franchise or authority and which involves possible danger to the public. Finally, the jury found that Davies was not negligent, awarding him damages.

Checker Cab moved for JNOV<sup>5</sup> on the ground that Davies failed to meet his burden of proving agency between Checker Cab and the cab's driver. The trial court denied the motion, finding that the "verdict was supported by the instructions given by the court and the evidence presented during the trial."<sup>6</sup>

Checker Cab now appeals the denial of its motion for JNOV on the ground Davies failed to establish agency.

## DISCUSSION

### I. Standard of review

Whether an agency relationship exists is a factual question for the trier of fact, whose determination may not be disturbed on appeal if substantial evidence supports it. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1576.) Where, as here, an appeal is taken from the denial of a motion for JNOV made on the ground there was insufficient evidence to support the jury's finding of agency, we review for substantial evidence. That is, the order denying the JNOV motion will be reversed only if, "disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is a determination that there is no evidence sufficiently substantial to support the verdict. On appeal, we must read the record in the light most advantageous to plaintiff, resolve all conflicts in his favor and give him the benefit of every fact pertinent to the

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<sup>5</sup> Checker Cab also moved for a new trial.

<sup>6</sup> The jury instructions are not part of the record on appeal.

issues involved and which may reasonably be deduced from the evidence.’ ” (*Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 854 (*Secci*)). Thus, once any legal issues are resolved, the standard of review is whether substantial evidence, contradicted or not, supports the jury’s conclusion. (*Ibid.*)

## II. There was substantial evidence of agency

Checker Cab contends there was insufficient evidence the taxi driver involved in the accident was its agent. After setting forth legal principles concerning agency, we apply that law to reach the conclusion that there was sufficient evidence to support the jury’s verdict.

### A. Agency

“An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 739, citing Rest.2d Agency, § 2.) In contrast, an agent is one who represents the principal in dealings with third persons, and that representation is called agency. (Civ. Code, § 2295.) “ ‘ “Agency results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” ’ ” (*van’t Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) “Thus, the ‘formation of an agency relationship is a bilateral matter. Words or conduct by both principal and agent are necessary to create the relationship.’ ” (*Ibid.*) Agency may arise by express agreement or it may be implied from the parties’ conduct. (*Ibid.*)

Control is the essential characteristic of agency. (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370; *van't Rood v. County of Santa Clara*, *supra*, 113 Cal.App.4th at p. 572.) However, additional factors relevant to establishing an agency relationship are: whether the one performing services is engaged in a distinct occupation; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the skill required to perform the agent's work; whether the principal or the agent supplies the workplace and the tools; the length of time for which services are to be performed; the method of payment, whether by the time or by the job; whether the work is a part of the regular business of the principal; and whether the parties believe they are creating the relationship of employer-employee. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 928.)

B. *Evidence of agency*

Checker Cab's contention rests on two arguments: (1) when a taxi company exercises control over drivers to comply with governmental or public regulations (so-called "pass-through . . . regulations") that activity—standing alone—is insufficient to establish an agency relationship as a matter of law, and (2) there is no evidence of agency in this case other than such pass-through regulations. As we now explain, both arguments are erroneous.

1. Pass-through regulations are relevant to agency

By Checker Cab's own admission, its first argument is largely irrelevant. Checker Cab agrees it is *not* "contending—and



has never contended—that municipal regulations cannot be considered in evaluating whether a relationship is an agency. It merely contends, supported by legal authority, logic, and reason, that such regulations *standing alone* are insufficient as a matter of law to impose an agency relationship on parties that intended their relationship to be an independent contractor arrangement.” (Underscore omitted and italics added.) By this, Checker Cab concedes that governmental regulations *are* relevant to determining the existence of agency.

This is all *Secci, supra*, 8 Cal.App.5th 846, which Checker Cab argues was wrongly decided, says. As here, that plaintiff was injured in a motorcycle accident involving a taxi, and he sued the taxi company. Evidence was introduced at trial that the taxi company had a franchise agreement with the city requiring the company to maintain insurance and to provide a list of insured vehicles to the city’s department of transportation. Other evidence was introduced that, for example, the company required drivers to pay monthly dues, that the company provided marketing and advertising, that drivers were required to use uniform credit card and dispatch equipment chosen by the company, that the company provided a training manual and required drivers to complete a training class, and that the company had road supervisors with authority to resolve disputes between drivers. (*Id.* at pp. 850–852.) Based on this evidence, the jury found the taxi’s driver was the taxi company’s agent. The trial court, however, granted the company’s motion for JNOV on the ground there was insufficient evidence of agency.

On appeal, the taxi company argued that when a taxi company exercises control over its drivers to comply with public or third party requirements, that activity cannot be considered in

determining whether an agency relationship exists. (*Secci, supra*, 8 Cal.App.5th at p. 858.) *Secci* disagreed and found that “public regulation of an industry does not, as a matter of law, shield a party from vicarious liability when it hires independent contractors, rather than employees.” (*Id.* at p. 859.) “California law does not preclude consideration of controls required by public regulations in finding an agency relationship.” (*Id.* at p. 850.) Thus, *Secci* merely found that fact finders may not “ignore” governmental controls in deciding whether a principal-agent relationship exists. (*Id.* at pp. 861–862.) It did not explicitly address whether governmental regulations *alone* can establish agency.

Indeed, *Secci, supra*, 8 Cal.App.5th 846 had no occasion to address that issue, because there was evidence other than the regulations that the company exercised control over its drivers. The taxi company in that case retained authority to terminate its relationship with its drivers, to fine or to discipline them, supplied them with training manuals, required drivers to participate in training and to use the company’s equipment, and deployed road supervisors. (*Id.* at p. 862.) Therefore, there was evidence that the taxi company imposed controls on its drivers that were not mandated by the city.

For our purposes, the salient point in *Secci* is governmental regulations are relevant to agency. Because Checker Cab agrees, we have no occasion to delve into its argument that *Secci* was otherwise wrongly decided.

However, we make one additional observation. To the extent Checker Cab relies on *Secci* to support an argument that governmental regulations alone are insufficient to establish agency as a matter of law, we would not find that argument

persuasive. The record does not show that Checker Cab made that argument below and, moreover, Checker Cab has failed to provide an adequate record showing it either asked for an instruction about how evidence of regulations should be weighed or that the jury was so instructed. Checker Cab, as appellant, had the burden of affirmatively showing prejudicial error and, to satisfy this burden, it had to provide an adequate record to assess error. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.)

2. There is evidence of agency other than the governmental regulations

Next, Checker Cab argues that governmental regulations were the only evidence it exercised control over drivers. Not so.

First, the record does not support Checker Cab's broad assertion that *all* controls were imposed by the franchise agreement or the city's regulations. Rather, it is not always clear whether Checker Cab imposed certain controls under applicable regulations or as a matter of its own policies. Smolyar testified, for example, that all Checker Cabs were painted yellow and blue, but he did not clearly state whether the franchise agreement or Checker Cab required this uniformity. Indeed, Feinstein said he painted his vehicle yellow and blue, because that is what Checker Cab required. Feinstein also said he had to buy a Crown Victoria, but it is unclear whether the city or Checker Cab required drivers to use a specific car make. (See *Smith v. Deutsch* (1948) 89 Cal.App.2d 419, 420 [distinctively painted taxi with taxi association's name painted on side was evidence of control].) The franchise agreement might have clarified these points but it is not part of the record on appeal.

In any event and aside from evidence of the city's regulations, there was evidence Checker Cab *itself* controlled

drivers and the drivers' work environment. Checker Cab supervised aspects of the driver's work. SCP, which acted on Checker Cab's behalf, employed a fleet manager to ensure that the vehicles were drivable, had the appropriate decals and markings, and prepared the vehicles for annual inspection. Also, a road supervisor would go to hotels to ensure that drivers had their plaques in front of the hotels and were servicing the hotels.

Checker Cab supplied tools required for the trade. It provided training classes to help drivers get their permits. Checker Cab equipped its vehicles with GPS. Checker Cab processed credit card payments. There was also evidence that Checker Cab supplied vehicles. Smolyar said that shareholders owned the vehicles, however, Checker Cab was the registered owner of 60 percent of the vehicles. There was also evidence that Checker Cab supplied drivers. Although Smolyar downplayed Checker Cab's involvement in selecting drivers, Feinstein testified that Checker Cab—not the owners—assigned drivers to cabs. Indeed, Feinstein denied knowing that Popovian was assigned to drive Feinstein's vehicle. That Checker Cab was involved in selecting drivers was further buttressed by its admission it advertised for drivers.

Checker Cab also created a company, SCP, to manage its taxi business and to assist drivers. SCP's call center connected customers with drivers. Dispatchers and an operations manager had authority to resolve disputes between drivers and customers. And Checker Cab dispatched a road supervisor to accident sites. (See *Smith v. Deutsch*, *supra*, 89 Cal.App.2d at pp. 422–423 [that taxi association's supervisors patrolled streets and went to accidents were indicia of control]; *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288 [cab

driver was company's agent for purposes of worker's compensation claim].)

Moreover, although there was evidence of agency aside from the governmental regulations, we can consider those regulations, per *Secci* and per Checker Cab's concession. Under its franchise agreement with West Hollywood, Checker Cab agreed to be directly and solely responsible for the conduct of its drivers. Checker Cab thus had to notify the department of transportation if a customer was overcharged. Also, the city's department of transportation rules required Checker Cab to suspend a driver for failing a drug test and for failing to report an accident. Notwithstanding these requirements, Checker Cab created an additional check on driver's behavior: a disciplinary committee to review complaints. And although Smolyar's testimony was not entirely clear, it could be interpreted that this disciplinary committee could suspend a driver for a period longer than otherwise required by the city.

Thus, there was substantial evidence of agency.

III. Evidence Checker Cab did not control its driver does not alter the outcome.

Checker Cab emphasizes evidence that drivers had control over aspects of their work. They could set their own hours, reject fares, choose their routes, drive for other companies, and use their own payment system. However, the standard of review is substantial evidence. As we have said, there was substantial evidence of agency. That there was evidence to the contrary does not require reversal of the judgment or the order denying JNOV. The jury evaluated the credibility of witnesses, including Smolyar, whose trial testimony was impeached several times with his deposition testimony and which impeachment could

have led the jury to reject those parts of his testimony downplaying the extent to which Checker Cab controlled the drivers. In other words, the jury weighed the evidence, and we may not reweigh it.<sup>7</sup> (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.)

### **DISPOSITION**

The judgment and order are affirmed. Luke Davies is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.

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<sup>7</sup> Because we conclude there was sufficient evidence of a principal-agent relationship between the driver of the cab involved in the accident with Davis and Checker Cab, we need not address the other grounds for liability in the special verdict, including whether Checker Cab ratified the driver's conduct.